

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

M.A. HANNA COLOR, AN OPERATING UNIT
OF M.A. HANNA COMPANY

and

Case 8-CA-28800

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW

Thomas M. Randazzo, Esq., for the General
Counsel.

Stanley Dan Pace, Esq., and *Bruce Hearey, Esq.*
(*Spieth, Bell, McCurdy & Newell Co., L.P.A.*),
of Cleveland, Ohio, for the Respondent.

Mr. Harold Cassel, International Representative,
of Maumee, Ohio, for the Charging Party.

DECISION

Statement of the Case

THOMAS R. WILKS, Administrative Law Judge. The unfair labor practice charge was filed against M.A. Hanna Color, an operating unit of M.A. Hanna Company, herein the Respondent, on February 5, 1977, and amended on July 21, 1977, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, herein the Union or Charging Party. After an investigation, the Regional Director of Region 8 issued a complaint against the Respondent on July 31, 1977. The complaint alleged that on January 17, 1977, the Respondent suspended its employee, Mark Hoffman, whom it later discharged on January 20, 1977, because of his union and protected concerted activities. The complaint also alleged that on January 17, 1977, the Respondent's agent and plant manager, Robert H. McElfresh, implied to an employee that a fellow employee had been discharged in retaliation for the employee's union membership, sympathies, and activities. On August 14, 1977, the Respondent filed an answer which admitted the suspension and discharge but denied the unlawful motivation and the other allegation regarding McElfresh.

The issues raised by these pleadings were litigated before me in a trial held in Sandusky, Ohio, on January 8 and 9, 1998. Those issues were whether Hoffman was discharged because of his admitted known activities on behalf of an unsuccessful union organizing campaign at the Respondent's Norwalk, Ohio plant, of which the object — union representation — Respondent admittedly opposed, or whether he was discharged for admittedly failing to adhere to a preexisting safety compliance procedure in operating an admittedly dangerous production machine. The subsidiary issues are whether the Respondent engaged in certain conduct which evidenced its union animus toward Hoffman; whether McElfresh engaged in the alleged misconduct; whether despite the mandated safety procedure,

Hoffman was “set up” by the Respondent for enforcement of the preexisting announced punishment by discharge for noncompliance by his being told by his lead person that he need not comply with it for this specific machine and by inadequate training in that safety procedure; and finally, whether the Respondent at its Norwalk plant did not enforce the compliance by discharging other subsequent alleged violators, despite evidence of enforcement by discharge at its various other plants.

At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit post-trial briefs, which were received on March 16 and 17, 1998.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs and my observation and evaluation of witnesses’ demeanor, I make the following findings:

I. The Business of the Respondent

At all material times, the Respondent has been an operating unit of M.A. Hanna Company, an Ohio corporation. The Respondent has an office and place of business in Norwalk, Ohio, herein called the Respondent’s facility, where it has been engaged in the manufacture and sale of color concentrates for the automotive industry. Annually, the Respondent, in conducting its business operations described above, sells and ships from its Norwalk, Ohio facility, goods valued in excess of \$50,000, directly to points outside the State of Ohio.

It is admitted, and I find, that at all times material, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

I find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

The Respondent is engaged in the manufacture and sale of color concentrates for the automotive industry and maintains numerous plants throughout the United States. The only facility involved herein is the Respondent’s Norwalk, Ohio facility.

Employees at the Respondent’s Norwalk facility are not represented by a labor organization. Respondent’s desire to preserve its nonunion status is undisputed, and its position on “unions” is reflected as follows in its employee handbook:

[Respondent’s] philosophy and practice in employee relations is based upon responding to the needs, concerns and desires of each employee in the best manner possible regarding wages, benefits, and job security, and working conditions. The progress and success of both [the Respondent] and the individual employee will

continue to be accomplished without the need for, or interference from a third party -- outside union organization.

It is [Respondent's] intention to preserve and maintain a non-union status through the Corporation, while recognizing and rewarding the singular individual contribution and needs of each employee.

General Manager Sturn acknowledged that he did not want the Union to represent its employees. The Union commenced an organizing drive at the Respondent's Norwalk facility in the early months of 1996.

Mark Hoffman began his employment at the Respondent's Norwalk plant on September 12, 1998. It is undisputed that he and employees Jeff Rettig and Mike Mapus were the primary union organizers among the Respondent's employees and that Hoffman spoke to employees about the Union and its benefits in the presence of managers.¹ Hoffman testified without contradiction that on May 21, 1996, he had a conversation with Sturn in which Sturn asked him if he was "pushing the union again." Hoffman responded in the affirmative.

The Respondent's witnesses characterized the union campaign as moribund by June 1996. The General Counsel's own witnesses are inconsistent on its June 1996 viability. Even Hoffman's attempt to characterize it as active is ambiguous. He testified that about June 21, "we were losing interest," but yet the three union advocates kept it active "constantly." Rettig, however, described the union drive as a "stalemate" and a "stand still" as of June 21 and admitted that he, Hoffman, and Mapus "were not making progress."

On June 21, a confrontation occurred between Sturn and the three union advocates in Sturn's office when the three initiated a visit there, according to Hoffman's and Rettig's direct examination testimony, to discuss the second shift quality control person position. In cross-examination, Hoffman testified that they confronted Sturn with a list of "suggestions" but not "demands." Hoffman recalled no request by them that Sturn refrain from making a public announcement about the end of the union campaign. Rettig was more forthcoming. He admitted that they asked Sturn not to "beat us down with a victory speech" and that Sturn agreed that he could not do so. This admission undermines the direct examination testimony of both Hoffman and Rettig that it was Sturn who brought up the subject of the union "out of the blue." However, Sturn admitted that after the three employees told him that the union drive was over, he did say something to the effect, "while I've got you three up here, just a little friendly advice, I've got broad shoulders and you're free to f- - with me just a little bit." He denied the testimony of Hoffman and Rettig that he threatened them with a selected enforcement of work rules if they continued to "lob hand grenades" at him. Sturn admitted that he did refer to work rules and that he did state, "I would never selectively enforce work rules. You don't have to worry about that. But I will enforce work rules." He admitted that he accused them of having had meetings at which they had made work condition requests which he had tried to satisfy but after which "you keep logging grenades with the law [sic]." Sturn testified that at the beginning of the meeting, the three employees identified themselves as the leading union protagonists and had offered to establish a harmonious relationship now that the union drive was over. He testified that this meeting was one of four similar meetings but that the unfair labor practice

¹ Mike Mapus' name appears as "Mafis" in the transcript. The record reveals that while Rettig is still employed by the Respondent, Mapus subsequently voluntarily left his employment with the Respondent. There is no suggestion that either Rettig or Mapus were subjected to any retaliation for their union activities.

charge was premised upon this meeting. He admitted stating, “If you keep pushing -- if you keep pushing, sooner or later we’re going to focus on you should be doing your jobs [sic].” Even under Sturn’s own testimony, there is an implied threat of retaliation for union and concerted protected activities. In light of Sturn’s admissions, I find that the testimony of Rettig and Hoffman is the more probable and that his threat of selective enforcement of work rules was more explicit.

That meeting was the subject of an unfair labor practice charge that had been subsequently settled by a non-Board adjustment, withdrawal of the charge, and a posting of a letter notice to employees. Although it is not clear, the record as a whole indicates that it was settled prior to the discharge of Hoffman. Another charge remained pending as of the instant trial.

Sturn characterized the essence of the settled charge as containing allegations that he had been “picking on” Hoffman. He testified that, thereafter, he avoided any direct confrontation with Hoffman. Similarly, he was motivated to accommodate a joint complaint from Hoffman and Rettig during a summer 1996 company-sponsored employee golf event at which their joint scores were discounted as being over-inflated. They were awarded prize money, Sturn testified, merely to avoid any accusation of discrimination.

The evidence thus establishes a sufficient basis to find that Sturn maintained some degree of animus toward Hoffman’s union activities in June 1996. The testimonial inconsistency between Hoffman and Rettig, which in large part corroborates Sturn, reveals Hoffman to be a witness who calculates and formulates his testimony in a more favorable light to his position. It also reveals him both in word and in demeanor to be evasive, calculating, and lacking in spontaneity indicative of candor.

B. *Safety Rules*

The contextual background with respect to the Respondent’s safety policies, procedures, and rules is in large part undisputed.

The safety procedure involved herein is that called “lock out — tag out.” It is a very simple procedure whereby a potentially dangerous production machine is not only turned off but its on-site electrical power source, usually located at a power box or terminal a few feet away, is cut off by flipping a lever which is fastened in closed position by the insertion of a small bicycle-type padlock which is locked and tagged by the employee for servicing, maintenance, or cleaning. That procedure is called “LOTO.”² According to OSHA regulations, the purpose is to prevent an unexpected surge of energy during servicing or maintenance. Also, according to OSHA regulations, while “normal production operations” can also present hazardous situations, i.e., whenever machines are used in their usual production function, those situations are generally covered by rules in other General Industry Standards, not LOTO. It is undisputed that most the machines operated in the Respondent’s Norwalk, Ohio plant are dangerous or potentially dangerous, including those machines last operated by Hoffman on the date of his suspension and discharge. It is also undisputed that Hoffman failed to perform LOTO on the machine he was cleaning. The failure to perform LOTO was the grounds for his suspension and discharge.

² All employees, including Hoffman, carried locks, keys, and tags on their persons.

In 1992, as a result of the failure to lock out a machine that he was cleaning, an employee was killed at the Respondent's Burton Rubber unit in Macedonia, Ohio. In 1993, the Respondent's president, Douglas J. McGregor, issued a memorandum to all business unit managers regarding the restructuring of the Hanna Safety program and the hiring of a consultant to aid in that regard. On January 12, 1995, McGregor issued another memorandum stating that the safety record was still unsatisfactory. This memo also announced a change — that safety performance was now going to have a direct effect on business unit profitability ("PFP"). After that date, each employee's compensation was going to be affected by the business unit's safety record.

On September 16, 1996, M.A. Hanna suffered a fatality in Texas. The fatal accident was a result of a failure to follow the LOTO procedure. McGregor reemphasized in a September 18, 1996, memorandum to all employees that safety was "our highest priority" and exhorted each employee to take "personal responsibility for safety in our respective workplaces." The federal Occupational Safety and Health Review Commission investigated the fatality and ultimately entered into a settlement agreement with the Respondent in June 1997. The investigation had begun in September 1996 and continued through 1997, until the settlement. That settlement required, inter alia: (1) the maintaining of a LOTO program (which the Respondent already had in place); (2) training for employees; and (3) a provision that the Respondent ensure that the failure to perform LOTO would result in the employees' immediate termination.

As a result of the most recent fatality and M. A. Hanna's heightened concerns for employee safety, a LOTO violation was now determined to be no longer merely a safety violation. It became the highest level of disciplinary offense requiring termination. Jim Goodman was the senior vice-president of operations for M.A. Hanna Color and his October 11, 1996, memorandum informing employees of the change was sent to all the business unit heads and subsequently distributed to all employees.

When Sturn learned of the Texas fatality, he sent his own memorandum on safety to his employees on September 17, 1996, which reemphasized the essential requirement of LOTO when cleaning machinery. On October 14, 1996, Sturn distributed to his employees Goodman's October 11, 1996, memorandum and again reemphasized LOTO procedures. Sturn's memorandum informed all M.A. Hanna employees that the newly revised employee handbook would upgrade any LOTO violation to a "Group One — Intolerable Violation," requiring termination.

Joe Bauer, president of M.A. Hanna Color visited the Norwalk plant in the fall of 1996 to discuss the Texas fatality and the new policy of immediate termination for LOTO violations.

C. Safety Procedure Training

OSHA regulations address the subject of employee safety training and set forth requirements for training "affected" and "authorized" employees ". . . in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control."

There is a dispute as to the actual amount and nature of LOTO training provided to employees prior to Hoffman's discharge. Hoffman was evasively reluctant in cross-examination to admit awareness of the Respondent's heightened safety awareness subsequent to the September 1996 fatality. He recalled having read only one memorandum regarding the matter.

He denied that the fatality was even discussed among the employees. He admitted that the Respondent's president did visit and discuss the accident with the employees and that a new policy of immediate discharge for LOTO failure was announced and instituted. It is undisputed that prior to his assignment to a "floater" position in November 1996, Hoffman was aware that he was obliged to perform LOTO procedures when cleaning production machinery.

In November 1996, Hoffman was awarded a job bid to the floater position which required his rotation of 1 month each to three specific jobs. He testified that with respect to the first phase position, he was trained in LOTO procedure by supervisor Scott Yanser, and with respect to the second phase, "salt and pepper" machine, he was trained in LOTO procedure by his supervisor, Scott Goodsite. Hoffman testified that he complied with the LOTO procedures. Hoffman testified that the third phase involved cleaning of the three types of "Mixaco" machines located on the plant mezzanine.

The Mixaco machines have a large lid with a motor on the top and blades underneath. The tub portion of the machine is filled with resin and is slid under the top portion of the machine. The tub then is lifted up and locked onto the top portion with hydraulics. The machine then flips the tub upside down and mixes the resin. When the mixing is completed, the tub is flipped back down and released. The tub is pulled out and the lid flipped open to the side. The machine is then accessible to clean. After it is cleaned, it goes back to a pre-set position. The potential danger in the event of an unexpected power surge during cleaning is undisputed.

Lead person Al Hensley is admitted in the answer to be a supervisor within the meaning of the Act. There is little evidence that he possesses any discretionary authority. Hensley trained Hoffman as to the operation of the Mixaco machines. Hoffman testified with respect to cleaning the Mixaco machines, Hensley told Hoffman that he need only flip off the power at the power box, but need not take the few seconds more required under LOTO to insert a lock and tag because "it was just repetitive." Hoffman never explained whether Hensley explained to him what he meant was "repetitive," nor what he, Hoffman, understood it to mean. Presumably, if Hoffman is credited, "repetitive" referred to the cleaning process. But just why either Hensley or Hoffman would think that repetitive cleaning removed an obvious hazard is not explained in the record.

Hoffman testified that he only worked on the Mixaco machines for 1 week (the first week in January). He took 3 or 4 vacation days off the second week of January, returned, and worked 1 more week until his suspension on January 17, 1997, and discharge on January 20, 1997. Thus, Hoffman only worked approximately 2 weeks on the Mixaco machines. Hoffman testified that he never followed the LOTO procedure for the Mixaco machines for those 2 weeks that he worked on them. During those 2 weeks of active work, Hoffman's coworker was Frank Cleavenger.

Despite the fact that Hoffman admitted to direct hands-on LOTO training by supervisors on the non-Mixaco machines as a floater, and Hensley's instructions as the reason he did not perform LOTO on the Mixaco machines, the General Counsel proffered testimony that there was an absence of such employee LOTO training before Hoffman's discharge, i.e., the testimony of color technicians Rettig and Stephen Palumbo who worked on admittedly dangerous machines. They claimed that they were only trained by employee meeting, video tape presentation. Just how much more needed to be explained for a maintenance person of normal intelligence to insert a small padlock through aligned holes in a lever and terminal box, and to place a tag thereon, was something never explained in testimony. Neither Palumbo nor

Rettig claimed that they did not know how to LOTO, nor that they failed to do so after October 1996, nor that they actually needed any more training.

5 While admitting to LOTO training by two supervisors as a floater, Hoffman denied that he received any LOTO training for the Mixaco machines. He admitted that on January 6, 1997, he signed his name to the first page of a training log for floaters. He denied that by that execution, he had acknowledged having received the type of training described at the top of the page. The attached pages contained references to the LOTO procedure for cleaning Mixaco machines, but Hoffman denied having seen those pages and claimed that they had not been
10 attached to the page he had signed. However, he gave no explanation of any purpose for signing that log that may have existed other than an acknowledgment of LOTO training for Mixaco machines at the very time he was assigned to cleaning Mixaco machines.

15 The General Counsel elicited the testimony of the second shift Mixaco machine worker, Donald Eastman. He also testified in direct examination that prior to Hoffman's discharge, "formal" training on LOTO was effected by video presentation at "various meetings on it." However, he also testified that it was Al Hensley's responsibility as a lead person to inform new employees to use LOTO procedure when cleaning a Mixaco machine. Apparently he obtained this impression from working with other lead persons, because he did not work with Hensley.
20 Thus, had Hensley told Hoffman to dispense with LOTO when cleaning the Mixaco machines, it would have been inconsistent with the practice of other Mixaco lead persons and the understanding of other Mixaco workers that the LOTO procedure was obligatory. Eastman failed to testify to any observed noncompliance with the LOTO procedure during Mixaco maintenance prior to Hoffman's discharge.

25 In cross-examination, Eastman acknowledged that he had signed training logs at training meetings held on the date of signature for each shift of the entire plant on the same date. He explained that all employees on the entire shift signed the log at the same meeting and that the top of the log refers to all the procedures that the employees have been trained in and that, contrary to his direct examination, that training involved more than a mere video
30 presentation. He explained that the training meetings were conducted by plant manager McElfresh. He further testified, in contrast to Hoffman, that at these training meetings, the employees not only see the front page of the log but they actually are given and they each read the actual procedures statement. I therefore find highly improbable Hoffman's testimony that
35 he merely executed the front page of a training log and was not presented with the attached required procedures for Mixaco LOTO on January 6, 1996. In light of Eastman's admissions and Hoffman's own testimony, I find that Palumbo and Rettig's testimony regarding the limited nature of LOTO training improbable.

40 In light of the inconsistencies and improbabilities inherent in the testimony of the above-cited General Counsel witnesses, I credit the testimony of McElfresh that on January 6, 1997, he conducted safety training meetings of all floaters, gave them all, including Hoffman, copies of the obligatory LOTO procedure, including those pertinent to the Mixaco machines, and reaffirmed the comments and admonishments of the Respondent's president made to all
45 employees in the preceding October general plant meeting.

Because of the above-cited improbabilities inherent in Hoffman's testimony, its inconsistency with other General Counsel witnesses' testimony, and the poor demeanor discussed above, I credit the testimony of lead person Hensley and Hoffman's coworker, Frank Cleavenger, where it conflicts with that of Hoffman. Hensley testified that it was his job to train Hoffman with respect to the operation and cleaning of the Mixaco machines and the obligatory compliance with LOTO procedure during training. Hensley furthermore explicitly and urgently

instructed Hoffman to comply with the LOTO procedure when cleaning the Mixaco machine, which even to the casual observation of a lay person is an inherently dangerous procedure unless an unexpected, inadvertent power surge is rendered impossible. Frank Cleavenger, Hoffman's coworker on the Mixaco machine in January 1996, testified that he was well aware of the obligation to follow LOTO procedure when cleaning the Mixaco machines under penalty of discharge of non-compliance and that he observed and heard Hensley admonish Hoffman to comply with the LOTO procedure.³

D. *Suspension and Discharge*

Cleavenger testified that several times prior to Hoffman's suspension on January 17, he observed him cleaning Mixaco machines, as Hoffman admitted, merely by turning off the power without following the LOTO procedure and that he admonished him to do so and reported to Hensley Hoffman's persistent failure to do so.⁴ Hensley testified that he observed Hoffman's failing to comply with the LOTO procedure while cleaning the Mixaco machines and, after admonishment, Hoffman initially complied.

Cleavenger testified that he reported Hoffman's non-compliance to the shift supervisor, Dave Williams, who later told Cleavenger that when he observed Hoffman, he failed to observe noncompliance with the LOTO procedure.

The Respondent's plant safety director, David Smith, became involved when Cleavenger reported Hoffman's LOTO delinquencies to him on about January 15. Smith testified that he failed to observe any delinquency when later that day he visited the mezzanine area. Smith and Cleavenger testified that the same sequence of events occurred Friday morning, January 17. Smith testified that in the afternoon of January 17, he visited the mezzanine and observed Hoffman cleaning a Mixaco machine without having complied with the LOTO procedure and that when he subsequently accused Hoffman of his delinquency, Hoffman responded that he would not do a "thing like that," but admitted it when Smith said he had observed it. Hoffman testified that he responded to Smith that he did not need to lock out his machine for cleaning but that Smith contradicted him and told him that he was obliged to do so. Smith then proceeded to the office to write up a LOTO safety violation notice to be served upon Hoffman. McElfresh entered and, being advised of what had occurred, stated that he would handle the matter. McElfresh, Hensley, and Cleavenger testified that McElfresh verified the delinquency report with Hensley and Cleavenger and arranged for them to execute word processor-printed statements confirming it.

McElfresh testified that in the afternoon, he decided to obtain Hoffman's version and then to report to his supervisor, Phil Davis. According to McElfresh, when he confronted Hoffman with the accusation, he responded with few words, claiming that he did comply with

³ The General Counsel argues that Cleavenger, McElfresh, and other Respondent witnesses should be discredited, inter alia, because of inconsistent testimony with respect to the date of Hoffman's employment in the Mixaco department and conversations they had with him regarding LOTO. However, they made clear in their testimony that the dates given by them, when pressed in cross-examination for specific dates, were at best speculated dates because they did not have present accurate recollection of those dates. Accordingly, they cannot be impeached with respect to estimated dates when they testified they were not certain of those dates.

⁴ Cleavenger explained in testimony that not only was he concerned about Hoffman's safety, but that accidents impacted upon his own remuneration.

the LOTO procedure. Hoffman testified that he told McElfresh that he was not going to say anything. Hoffman testified that he confronted Hensley, stating that Hensley had told him he need not comply with LOTO, but Hensley stated that he had told him the contrary and Cleavenger, who was present, corroborated Hensley. McElfresh told him he was suspended,
 5 pending an appeal interview with manager Sturn on Monday, January 20. Sturn was not in the plant on January 17.⁵

On Monday, January 20, the appeal interview was conducted by Sturn; present with him were McElfresh and Smith. Hoffman was permitted to bring with him an employee witness,
 10 Keith Ensign. It is undisputed that when Hoffman was confronted with the LOTO safety procedure violation and asked if he in fact had failed to comply with the procedure, he refused to make a statement except to claim that other unnamed employees failed to comply with the LOTO procedure. Sturn stated that he, consequently, must discharge Hoffman. It is
 15 undisputed that at that meeting, Hoffman did not claim that he had not been trained in LOTO procedure for the Mixaco machines, nor that he was unaware of the obligation to comply with it, nor that Hensley had dispensed him from that obligation. Neither during that meeting nor in his testimony did Hoffman identify other employees who had failed to comply with the LOTO procedure and who were not discharged between October 1996 and his suspension.

Hoffman testified that during the meeting he claimed that he had been "set up" but did not set forth the basis for his accusation.

It is undisputed that Ensign became angered and banged his fist on the table and also claimed that the discharge was the result of a "set up" and, in effect, that he thought it was reprehensible that the Respondent could recruit two employees to collude in the discharge.
 25 Ensign testified without contradiction that he followed Hensley out of the room, demanding of him, "What happened, Al?" When he asked "you guys set him up; admit it," Hensley backed away and, with lowered head, mumbled "yes" Inconsistent with Ensign's testimony, Hoffman testified that after Ensign made his heated remarks at the table, he, Ensign, also
 30 stated to the assembled group that Hensley had admitted to him that it was a set-up. Ensign, however, testified that Hensley made the admission later after Ensign followed him out. In cross-examination, Ensign testified that he did not tell Hoffman or anyone else about that admission until 6 weeks before the trial.

Hoffman testified that after Ensign vented his anger, Hoffman told him to sit down because he would be back. Hoffman also testified that when he was cleaning out his possessions from his locker in the locker room, to which McElfresh and Smith escorted him, after Smith walked out, McElfresh made a crucial admission. According to Hoffman, McElfresh stated to him, "See what it got ya" and, as they were leaving the room, "I guess this will take
 40 care of our union problem." McElfresh denied having made that statement. Smith testified that

⁵ Sturn testified as to the process that the Respondent goes through at the Norwalk facility in determining when a LOTO violation has occurred. He testified that before a supervisor can
 45 confirm an incident, he first must consider what in fact happened and whether there are witnesses or other firsthand knowledge of the incident. The employee is then suspended, pending a hearing with Sturn. Once a LOTO violation has been established, Sturn has no discretion as to the penalty. Whether in fact a LOTO violation has occurred can be a complicated decision and not necessarily clear-cut. Sturn testified that he would consult with attorney Hahn in making that determination; but once, it is clearly established that a LOTO violation has occurred, he has no discretion as to the resultant discipline.

he was with McElfresh in the locker room, i.e., had not left him there alone, and denied that McElfresh made that admission.

Whether the so-called admission is a clear admission of unlawful motivation is arguable and not entirely free from ambiguity. The statement could have just as well implied that Hoffman was not immunized from lawful discipline because of past union activities.⁶ However, I credit the testimony of Smith and McElfresh and Hensley who, like the other Respondent witnesses, particularly Cleavenger, exhibited a spontaneous, uncalculating, straightforward, convincing demeanor. Hoffman's credibility deficiencies have already been noted, the last of which was his inconsistency with Ensign regarding the alleged "set up" admission by Hensley. Both Ensign and Hoffman's testimonial credibility are undermined by that inconsistency. Further, in light of Rettig's admission and Sturn's credited testimony as to the virtual end of active union organizing 6 months earlier, I find it highly improbable that Hoffman's active employment would have been considered by the Respondent to pose any real threat of union organizational activity and, therefore, such a bald admission would have been highly unlikely.

Finally, although Hensley's mumbled "yes" to the set-up accusation was not contradicted, I have problems as noted above with Ensign's credibility. But assuming the statement was made, it also is not free from ambiguity and was made by a lower level, lead person albeit, admitted supervisor, who did not participate in the suspension and discharge decisions. Furthermore, there is undisputed evidence that Stanley Pace, the Respondent's outside attorney who prepared the non-Board settlement of the aforementioned unfair labor practice charge, had received reports from the Respondent's management in early January to the effect that Hoffman had been reported to be in noncompliance with the LOTO procedure obligation and had on January 2, 1997, telephoned union representative Harold Cassel, who had filed that settled charge, and advised him of those reports. It is further undisputed that Pace reminded Cassel of the October fatality, of the subsequent new immediate discharge penalty, and that since the parties were in process of finalizing the non-Board settlement, every effort should be made by Cassel to counsel Hoffman as to his LOTO obligation. It is undisputed that Cassel asked whether Hoffman had been trained and knew the rules and when assured he had, further stated, "Well if he knows the rules -- the chips will have to fall where they may."

Such forewarning is patently incongruous with a planned "set up" of unlawful discharge.⁷

E. Alleged Disparity of LOTO Enforcement

The General Counsel elicited evidence of several post-discharge incidents of alleged LOTO violations which did not result in the discharge of an employee. It is not necessary to evaluate the details of these incidents as they are all distinguishable from the facts in Hoffman's situation.

In the so-called Vickie Moser—March 1997 incident, she hurt her hand while in the process of operating a machine. She was not assigned to the process of cleaning or servicing

⁶ Hensley testified that as he accompanied Hoffman to the office for the January 20 appeal hearing, Hoffman asked him to lie for him and also stated, "What are they gonna do, fire me? They can't . . . I've got the union behind me." Hoffman contradicted Hensley.

⁷ Cassel was present at trial as the Charging Party representative, but he did not testify.

a machine. The General Counsel speculates that because of certain statements made by her to supervisors about the accident which appeared to raise doubt as to her credibility, she may have somehow converted her assigned production task into a servicing operation. However, the Respondent had an issue of fact in her case, unlike the clear, admitted, intentional LOTO delinquency of Hoffman while cleaning a machine. There were no eyewitnesses upon which the Respondent could discredit Moser and conclude that she did not commit an unsafe production act, i.e., injury to her hand through sheer poor judgment while operating a machine in a production task.

Other alleged instances of non-LOTO compliance are also distinguishable and arguably did not clearly apply to OSHA LOTO regulations, e.g., a machine that had its power source totally disabled by pulling its only power source out of the wall socket, or where a machine was totally inoperable, or where the employee was engaged in production and not servicing, maintaining, or cleaning a machine as his assigned task at the time. Thus, there is no evidence that the Respondent had tolerated, without penalty of discharge after October 1996, a clear-cut uncontested, admitted instance of a failure to comply with the LOTO safety procedures.

There is uncontested evidence that the Respondent has enforced its heightened rules on LOTO procedure. At least 12 employees have been terminated at various Hanna Color plants around the country since October 1996, when the rules changed to require termination. The other affected employees have been employed in Texas, New Jersey, North Carolina, and Illinois.

Analysis

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 113 LRRM 2857, 2861, n. 7 (1983).

The Board has explained the allotted *Wright Line* burden of proof in *W.F. Bolin Co.*, 311 NLRB 1118 (1993). In that case, the Board stated:

First, the General counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. In order to rebut the prima facie case, the Respondent must demonstrate that it would have laid off [the discriminatees] in the absence of their protected activities. To establish its defense, the Respondent has the burden of presenting an "affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the product conduct" [citation omitted].

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2nd Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354

(7th Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

5 The General counsel has adduced evidence of Respondent animus toward union representation and toward Hoffman's union and protected concerted activities that preceded Hoffman's suspension and discharge by 6 months. Although it might be inferred that at the earlier period of time, the Respondent would have been delighted with Hoffman's departure from its employment, I find that the General Counsel has failed to prove by a preponderance of evidence that the preexisting animus actually motivated, even in part, the subsequent adverse action. But even if animus had been proven as a partial motivating factor, I find that the Respondent has sustained the burden of proving that regardless of his protected activities, Hoffman would have necessarily been discharged as a consequence of the nondisparate enforcement of a validly motivated safety rule based upon the following conclusions.

15 1. The Respondent had suffered fatalities because of LOTO violations;

2. The Respondent changed its work rules as a result to increase the severity of discipline for a LOTO violation;

20 3. The Respondent's employees, including Hoffman, were informed as to the reason for the change and the change itself;

4. The Respondent's employees, including Hoffman, were thoroughly trained in LOTO, both before and after the change in the policy;

25 5. Hoffman was specifically warned about the failure to do LOTO by both supervisors and coworkers;

30 6. Harold Cassel, who had represented Hoffman before the National Labor Relations Board, was informed of the Company's concern that Hoffman was not adhering to LOTO;

7. Hoffman was observed by fellow employees, and also management, failing to do LOTO;

35 8. Between 12 and 14 other employees around the country were terminated for LOTO violations between October 1996 and August 1997;

9. Hoffman was suspended and given an opportunity to explain himself;

40 10. Hoffman did not deny that he failed to do LOTO, nor did he suggest that he did not understand LOTO or that he was improperly trained;

45 11. Hoffman was terminated for failing to perform LOTO in a situation that clearly called for it or would have been so terminated in any event, regardless of his union or concerted protected activities.

I further find that the facts further fail to support the remaining 8(a)(1) allegations of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

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The complaint is dismissed in its entirety.

Dated, Washington, D.C.

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Thomas R. Wilks
Administrative Law Judge

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⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.